

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2592 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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A J MODI

Versus

CHAIRMAN

Appearance:

MR DN PANDYA FOR MR VM TRIVEDI for Petitioner
MR DUSHYANT A DAVE for Respondent No. 1
RULE SERVED for Respondent No. 2
M/S TRIVEDI & GUPTA for Respondent No. 4

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 16/06/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution the petitioner has challenged the order of his termination on the ground of unauthorised absence, as confirmed by the appellate authority of the Gujarat Industrial Development Corporation.

2 The short facts leading to the filing of the petition are as under.

2.1 The petitioner was appointed as a work-charged karkoon on 2.4.1974. The petitioner was transferred from Ankleshwar to Surat. Pursuant to the said order of transfer, the petitioner was relieved from Ankleshwar on 17.8.1982 on 24.9.1982 the petitioner resumed his duties at Surat. The petitioner was given posting at Pandesara Sub-Division where he reported on 5.10.1982.

2.2 From 6.10.1982 the petitioner remained absent from duty without submitting any leave report. On 4.12.1982 the Executive Engineer sent a communication to the petitioner taking serious view of the petitioner's absence from duty. On receiving the said notice the petitioner resumed the duty on 6.12.1982 and on 10.12.1982 the petitioner submitted his leave report. The reason given by the petitioner for absence was family social work.

2.3 The petitioner again remained absent from 1.1.1983. On this occasion also the petitioner remained absent without giving any leave report. Hence, on 24.3.1983 (Annexure-F) the Executive Engineer sent a show-cause notice to the petitioner taking a serious view of the unauthorised absence of the petitioner in September/ October 1982 for a period of 37 days and further unauthorised absence of two months from 6.10.1982 to 5.12.1982 without any leave report and again unauthorised absence from 1.1.1983 onwards. The petitioner was informed that as per Regulation 31 of The GIDC (Staff) Regulations, 1963, (for short, the Regulations) if the employee could not submit the leave report on account of the sickness or accident, the employee was required to give a report and certificates, if any, within 3 days. However, the petitioner had not acted accordingly and that the petitioner was required to show cause as to why the petitioner's services should not be terminated in view of such misconduct. After the said show-cause notice was issued on 24.3.1983 the petitioner reported for duty on 25.3.1983 and on 30.3.1983 applied for leave on the ground of his sickness. On 16.4.1983 the Executive Engineer wrote a letter to the petitioner

stating that the petitioner had not produced any medical certificate though he had stated in the leave report that he would be sending the doctor's certificate regarding his sickness.

2.4 Again the petitioner remained absent from the services from 19.4.1983. There is some dispute on the question whether the petitioner had sent his leave report for such absence from 19.4.1983 onwards. However, the show-cause notice dated 24.3.1983 was issued on the basis of the petitioner's absence for the period from 18.8.1982 to 23.9.1982 and again unauthorised absence for two months i.e. from 6.10.1982 to 5.12.1982 and the third instance of unauthorised absence from 1.1.1983 onwards. However, the petitioner neither sent any written reply to the aforesaid show-cause notice nor did he send the medical certificate in spite of the letter dated 16.4.1983 from the Executive Engineer. The Executive Engineer therefore passed the impugned order dated 9.6.1983 (Annexure-B) terminating the petitioner's services with immediate effect.

2.5 The petitioner filed Special Civil Application No.3593 of 1983 for challenging the said order. The petitioner was, however, relegated to the statutory remedy of appeal and that petition was accordingly disposed of. The petitioner filed appeal before the Superintending Engineer who gave a personal hearing to the petitioner on 2.2.1984. After giving a finding that the petitioner had not given any explanation for his unauthorised absence from 18.8.1982 till 23.9.1982 (37 days), for not submitting leave report during unauthorised absence from 6.10.1982 till 5.12.1982 (2 months) and for unauthorised absence from 1.1.1983 to 24.3.1983 (83 days) without giving any leave report, the Superintending Engineer also found that right from the date of being relieved from Ankleshwar Sub-Division the petitioner had more or less remained absent without prior permission and without any justifiable grounds. As far as the petitioner's leave report alleged to have been sent for the petitioner's absence from 19.4.1983 onwards is concerned, the Superintending Engineer gave a finding that such a leave report was neither received by the Executive Engineer nor by the Deputy Engineer and that the petitioner had not produced the certificate of posting under which leave report was sent for the absence from 19.4.1996 onwards.

3 It is against the aforesaid orders of the Executive Engineer and the appellate order that the petitioner has filed the present petition. At the

hearing of this petition, Mr Pandya, learned counsel for the petitioner has challenged the order of termination on the following grounds:-

- (1) The impugned order was passed without issuing any show-cause notice to the petitioner.
- (2) The impugned order was passed without holding any inquiry under Article 311 of the Constitution and without issuing any second show-cause notice as required by the said Article.
- (3) The impugned order was passed in violation of Regulation 31(2) of the Regulations.
- (4) The petitioner had sufficient leave to his credit and, therefore, there was no misconduct in remaining absent and subsequently applying for leave.
- (5) Non payment of salary for the periods of absence and termination from service amounted to double jeopardy.
- (6) The penalty of termination was unduly harsh and disproportionate to the misconduct.

CONTENTION NO.1

4 As far as the first ground is concerned, Mr Pandya's contention is that the letter dated 24.3.1989 was merely a communication to resume duty failing which stern action will be taken if the petitioner did not comply with the same by resuming duty on 25.3.1989. Hence the said letter cannot be treated as a show-cause notice.

The contention cannot be accepted because the notice dated 24.3.1983 issued by the Executive Engineer and produced at Annexure-F to the petition clearly mentioned the absence of the petitioner for 37 days in September/October 1982, unauthorised absence of the petitioner from 6.10.1982 to 5.12.1982 and again unauthorised absence from 1.1.1983 onwards and the petitioner was called upon to show cause as to why the petitioner's services should not be terminated in view of the aforesaid misconduct.

5 Mr Pandya also submitted that the Executive Engineer and the Superintending Engineer have also referred to the petitioner's unauthorised absence from 19.4.1983 onwards but no show-cause notice was given for the same and in fact the petitioner had sent his leave report under certificate of posting on 20.4.1983.

It is clear that the authorities have not based their decision merely on the said period of absence from 19.4.1983. Admittedly, the petitioner did not produce the certificate of posting dated 20.4.1983 before the authorities. The petitioner had contended that the certificate was lying with his advocate at Ahmedabad. Even if that be so, the fact remains that the show-cause notice was given for three periods of unauthorised absence between 17.8.1982 and 25.3.1983 and the petitioner's explanation for the said three periods of unauthorised absence was not found by the authorities to be satisfactory. This court does not sit in appeal over the decision of the authorities. As per settled legal position, whenever an order of administrative authority is passed on the basis of several grounds and it is found that one of the grounds is not tenable, even then, the order cannot be interfered with if the order can otherwise be upheld on the other grounds which are found to be valid (vide STATE OF MAHARASHTRA v. BABULAL AIR 1967 SC 1353.)

CONTENTION NOS.2 AND 3

6 As far as second contention is concerned, namely, that the petitioner was entitled to the benefit of Article 311 of the Constitution and that the respondents had not conducted any enquiry in accordance with the provisions of the said Article, the same is thoroughly misconceived. The petitioner was an employee of the GIDC which is a separate legal entity from the State of Gujarat. GIDC is a statutory corporation and the employees of the GIDC are not civil servants and, therefore, are not entitled to the protection of Article 311 of the Constitution. Of course, the employees of the corporation would be entitled to the protection conferred by Articles 14 and 16 of the Constitution and therefore they are certainly entitled to get a reasonable opportunity of being heard. In the facts of the case, however, it cannot be said that the petitioner was not given any reasonable opportunity of being heard. In spite of the show-cause notice dated 24.3.1983, the petitioner did not give any reply. It is pertinent to note that the misconduct for which the show-cause notice was issued was unauthorised absence of the petitioner on

three occasions and the periods of such unauthorised absence were not for a day or two, but for a period of more than a month on each occasion. The reasons for remaining absent were within the personal knowledge of the petitioner. Admittedly, no leave report was given for unauthorised absence of 37 days from 18.8.1982 to 23.9.1982, the leave report given on 10.12.1982 for unauthorised absence of two months from 6.10.1982 to 5.12.1982 was not only late but was very cryptic and merely mentioned that the petitioner had to remain absent on account of social family work without giving any particulars. Again the petitioner remained unauthorisedly absent from the work from 1.1.1983 to 24.3.1983 i.e. for 83 days. For the said period, in the leave report dated 30.3.1983 the petitioner had mentioned that he was sick and he would be sending the medical report later on. The medical certificate was not however sent by the petitioner in spite of the letter dated 16.4.1983 sent by the Executive Engineer. It is also pertinent to note that the petitioner resumed the duty on the second occasion i.e. on 6.12.1982 after the executive engineer sent a strongly worded letter dated 4.12.1982 taking a serious view of the petitioner's unauthorised absence. Similarly, on the third occasion also the petitioner resumed duty on 25.3.1983 only after issuance of the show-cause notice dated 24.3.1983. From the manner in which the petitioner remained absent for six months out of seven months between 17.8.1982 to 25.3.1983, the inference drawn by the Superintending Engineer that the petitioner was careless towards his duty right from the day of his being relieved from Ankleshwar Sub-Division is well supported by the aforesaid chronology of events. The petitioner was certainly guilty of misconduct of unauthorised absence for long periods and it cannot be said that the petitioner was not given any opportunity of hearing to point out the facts in his possession. It was for the petitioner to bring the necessary facts to the notice of the authority to show that there were justifiable grounds for his absence and also valid grounds for not submitting his leave report within reasonable period, as required under Regulation 31(1) of the Regulations. Clauses (1) and (2) of Regulation 31 read as under:-

"31 Employees not to be absent from duty without permission or to be late in attendance:- (1) An employee shall not absent himself from his duties without having first obtained the permission of the (Appointing Authority), nor shall he absent himself in case of sickness or accident without submitting within three days of such absence a

sufficient medical certificate; provided that in the case of temporary indisposition the production of a medication certificate may, at the absolute discretion of the (Appointing Authority) be dispensed with.

- (2) An employee who absents himself from duty without leave or overstay his leave, except under circumstances beyond his control for which he must tender a satisfactory explanation, shall not be entitled to draw any pay and allowances in respect of the period of such absence or overstay. Such unauthorised absence would be treated as misconduct and the employee shall further be liable to such penalties. for misconduct as the (Appointing Authority) may deem fit. The period of such absence or overstay, may, if not followed by termination of services under Regulation 18 or dismissal under Regulation 40 be treated as period spent on ordinary, sick, special or extraordinary leave, as the Appointing Authority may determine."

(emphasis supplied)

It is thus clear that it is for the employee to tender a satisfactory explanation for his absence without leave and also to explain the delay in submitting the leave report. The petitioner having failed to render a satisfactory explanation, it cannot be said that the order is in violation of the provisions of Regulation 31(2) of the Regulations.

CONTENTION NO.4

7 As regards the contention that the petitioner had earned leave to his credit which was more than sufficient to cover the unauthorised period of absence, it is not possible to accept this contention because, the employee is not entitled to proceed on leave as a matter of right. Even if the employee has leave to his credit, he cannot proceed on leave without getting the leave sanctioned in advance. Even if, for circumstances beyond his control, leave cannot be applied for in advance, the application must be made as early as possible. Neither the petitioner gave such an application during the long periods of absence nor did he give any explanation for not submitting leave reports during the three long periods of absence between 17.8.1982 and 25.3.1983. Even otherwise, the reasons given by the petitioner in his

subsequent leave reports for absence on the second and third occasions have not been found to be satisfactory. The petitioner did not submit any leave report on the first occasion. The decision of the authorities cannot, therefore, be said to be arbitrary or perverse.

CONTENTION NO.5

8 The contention that the petitioner was made to suffer double jeopardy has to be stated only to be rejected. By no stretch of imagination it can be said that non payment of salary during the period of unauthorised absence would amount to penalty. As per the settled legal position, the principle of "no work no pay" does not inflict any penalty.

CONTENTION NO.6

9 As regards the contention that the penalty was disproportionate to the misconduct, it is not possible to accept the said contention. The petitioner's unauthorised absence was not for a day or two but for long periods. As already noted above, on the first occasion the petitioner unauthorisedly remained absent for 37 days, very soon on the second occasion the petitioner unauthorisedly remained absent for a period of two months and on the third occasion for almost three months. On the first occasion the petitioner did not submit any leave report. On the second occasion the petitioner resumed duty only after the executive engineer sent a strongly worded letter to the petitioner and on the third occasion the petitioner resumed duty only after the executive engineer sent the show-cause notice. Even for the said unauthorised absence on the second occasion the ground given by the petitioner in his leave report given after resuming his duty was family social work. It cannot be said that such a ground would constitute satisfactory explanation for unauthorised absence of two months. Similarly on the third occasion also the ground given was petitioner's personal sickness without submitting any medical report. This also cannot be said to be a satisfactory explanation for unauthorised absence of two months and 24 days.

O R D E R

10 Under the circumstances, there is no merit in any of the contentions advanced by the learned counsel for the petitioner. The petition therefore deserves to be dismissed and is accordingly dismissed. Rule is discharged with no order as to costs.

(mohd)

